

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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In the Matter of)

Amendment of Part 90 Concerning the)
Commission's Finder's Preference Rules)

WT Docket No. 96-199

To: The Commission

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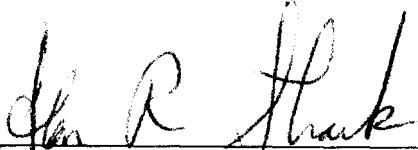
Federal Communications Commission
Office of Secretary

REPLY COMMENTS OF THE
AMERICAN MOBILE TELECOMMUNICATIONS
ASSOCIATION, INC.
TO THE NOTICE OF PROPOSED RULE MAKING

Respectfully submitted,

AMERICAN MOBILE TELECOMMUNICATIONS
ASSOCIATION, INC.

By:


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The American Mobile Telecommunications Association, Inc. ("AMTA" or "Association"), pursuant to Section 1.415 of the Federal Communications Commission ("FCC" or "Commission") Rules and Regulations, respectfully submits its Reply Comments in the above-entitled proceeding.¹ Consistent with the majority of commenting parties, AMTA supports the FCC's proposal to eliminate the Finder's Preference program in the 220 MHz band, and further recommends that all pending Finder's Preference requests be processed expeditiously, consistent with the substantive and procedural requirements set out already in the Commission's rules.

I. INTRODUCTION

AMTA is a nationwide, non-profit trade association dedicated to the interests of the specialized wireless communications industry. The Association's members include trunked and conventional 800 and 900 MHz Specialized Mobile Radio ("SMR") operators, licensees of wide-area SMR systems, and commercial licensees in the 220 MHz band. These companies provide commercial wireless service throughout the country. AMTA's 220 MHz members will be affected directly by the FCC's decision in the instant proceeding. Many of the Association's members operating in the 800 MHz and 900 MHz bands are either the target or the proponent of Finder's Preference requests. Some are both. Thus, the Association has a significant interest in the outcome of this proceeding.

¹ Notice of Proposed Rule Making, WT Docket No. 96-199, FCC 96-383 (rel. Sept. 27, 1996) ("Notice" or "NPR").

II. BACKGROUND

The Finder's Preference program was adopted by the Commission in 1991.² It has been available in the 470-512 MHz, 220 MHz, 800 MHz and 900 MHz bands, where frequencies may be assigned on an exclusive basis, for use by entities that have identified prima facie violations of the Commission's construction, placed-in-operation, and deconstruction requirements. A party providing detailed proof to support such a violation may "target" the non-compliant station and, if the allegations are proven correct, will be given a preference for the channels recovered.

As noted in the NPR, the FCC has received almost fifteen hundred (1500) such requests since the inception of the program. It has disposed of nine hundred (900), and has slightly more than five hundred (500) still pending. The Notice also indicates that approximately eighty percent (80%) of both the processed and pending requests are for SMR channels in the 800 MHz and 900 MHz bands. Notice at ¶ 8. The FCC stopped accepting Finder's Preference requests for 800 MHz and 900 MHz SMR channels in conjunction with its decisions, or in some cases proposals, to replace the current site-specific licensing scheme for those frequencies with geographic licensing provisions, reasoning that the geographic licensee should be entitled to channels recovered for rule violations. Notice at n. 26. The agency has continued to accept requests targeting non-SMR Private Land Mobile Radio ("PLMR") frequencies in the 470-512 MHz, 800 MHz, and 900 MHz bands, as well those in the 220 MHz band.³

² Report and Order, PR Docket No. 90-481, 6 FCC Rcd 7297 (1991) ("Report and Order"). Some parties, including AMTA, opposed adoption of the program. They cautioned that this type of FCC-sanctioned "bounty hunter" program could be susceptible to abuse, and might actually impede, rather than expedite, the enforcement process. Report and Order at ¶ 32.

³ Because the first opportunity for filing a Finder's Preference is one hundred eighty (180) days after the expiration of a construction deadline, 47 C.F.R. § 90.173(k)(2), few, if any,

The instant Notice proposes to conform the 220 MHz band to the provision at 800 MHz and 900 MHz. In light of the pending proposal to implement geographic licensing at 220 MHz, the Commission has tentatively concluded that a Finder's Preference program could prevent the geographic licensee from providing service throughout its operating area or at least require the licensee to compete for spectrum already covered under the geographic authorization, contrary to the FCC's intention. Notice at ¶ 9. Therefore, the FCC has proposed to eliminate the program at 220 MHz, and has decided to discontinue processing any requests already on file, pending the outcome of this proceeding.

In addition, the Notice requests comment on the need to retain the program for PLMR frequencies in the 470-512 MHz, 800 MHz and 900 MHz bands. Notice at ¶ 10. It notes that relatively few requests have been filed for these channels, and suggests that other enforcement tools are adequate to ensure compliance with Commission requirements.

Finally, the NPR proposes that the FCC retain the discretion to dismiss pending Finder's Preference requests for services "in any frequency bands in which we decide to eliminate the finder's preference program as a result of this rulemaking proceeding." Notice at ¶ 11. In support of that proposal, the Commission argues that parties whose requests were dismissed would not be harmed by that action as they still would have the opportunity to apply for the frequencies once they are recovered and made available for licensing.

requests have been filed against 220 MHz licensees whose construction dates have been extended on several occasions.

III. DISCUSSION

The Comments filed in response to the Notice generally support the FCC's proposal to eliminate the Finder's Preference program in the 220 MHz band. Incom Communications Corporation and SMR Advisory Group, L.C., both of which own or manage significant numbers of 220 MHz systems, agree that retention of the Finder's Preference program would be inconsistent with the proposed geographic area licensing approach. Only the Industrial Telecommunications Association, Inc. ("ITA"), which does not claim to represent any 220 MHz interests, appeared to oppose this aspect of the FCC's proposal. AMTA's 220 MHz Council, which represents virtually all active participants in both the service provision and manufacturing segments of the 220 MHz industry, concurs with the FCC's proposal and recommends that the program be eliminated in this band.

The record is less clear on the Commission's proposal to eliminate the program for PLMR channels. Motorola, Inc. argues in favor of retention of the program for those frequencies, while the Personal Communications Industry Association, Inc. ("PCIA") recommends that it be retained for all services that continue to be licensed on a site-specific basis. ITA opposes any curtailment in the applicability of the program, including, but not limited to, its elimination for PLMR services. All of those parties assert that the program will continue to be a valuable compliance tool, and that the small number of such requests argues in favor of retention since the demand on FCC resources is relatively limited.⁴

⁴ ITA also suggests that if the FCC's proposal was dictated by limited agency resources, oversight of the Finder's Preference program could be delegated by the Commission to certified frequency coordinators. ITA Comments at ¶ 17. AMTA opposes that proposal as it would put coordinators in the position of investigating, and perhaps even determining, the validity or invalidity of licenses, authority substantially beyond the scope of their current responsibilities.

On balance, AMTA believes that the record supports retention of the Finder's Preference program for PLMR channels. Whether the limited number of requests evidences a lack of broad interest in these channels or a high level of licensee compliance with the FCC's rules, its retention is unlikely to be an unreasonable burden on the Commission. The Association recommends continued availability of the program for PLMR service frequencies because they have not generally been subject to the abuses that became prevalent in Finder's Preferences targeting SMR frequencies, and conditioned on strict FCC enforcement of its rules regarding the level of evidence required to support a Finder's Preference request.

Finally, the Comments reflect substantial confusion regarding the scope of the FCC's proposal that the agency retain discretion to dismiss certain pending Finder's Preference requests. A significant number of individuals and organizations interpreted the Notice to contemplate the dismissal of pending requests targeting 800 MHz and 900 MHz SMR channels, as well as those for the 220 MHz and PLMR frequencies at issue in this proceeding.⁵ While AMTA does not read the Notice to propose such extensive applicability, it is mindful of the heated reaction to that possibility by parties with pending requests and has considered their comments carefully.

As already noted, AMTA opposed adoption of the Finder's Preference program at the outset precisely because of its concern that the process was susceptible to abuse and could become extremely burdensome to the Commission and the industry. The Association has concluded, regretfully, that its concerns were not misplaced. There have been substantial

⁵ See, e.g., Comments of SMR Won, Telacom Corporation, Gwyn J. Mitchell and Bruce Bryant.

numbers of frivolous or inadequately documented requests filed, not all of which were dismissed outright for failure to make a prima facie case. Those abuses were compounded by a lack of Commission clarity regarding the significance of constructing at incorrect coordinates which triggered the submission of large numbers of requests based solely on discrepancies between authorized and actual site information.⁶ The Commission subsequently clarified its standard, but that clarification was challenged and, even now, remains unresolved on appeal.⁷ The processing of legitimate, properly submitted and documented requests has been delayed while the FCC has attempted to deal with this volume of filings, a number of which should not have passed initial scrutiny. Therefore, to the extent the FCC retains this program, AMTA urges it to be rigorous in demanding that prospective finders satisfy at the outset the high burden of proof required by the FCC's own rules.

However, despite its initial reservations about the program and its concern about the abuses that have occurred in its implementation, AMTA opposes the dismissal of pending Finder's Preference requests in any band or service. The Association generally is opposed to the retroactive application of changes in the Commission's rules as inconsistent with principles of equity. Contrary to the FCC's assertion, AMTA is not persuaded that parties with pending requests would not be substantially harmed by their dismissal. As an initial matter, it is unclear how the channels would become available for reassignment to the original finder or any other party post-dismissal unless the Commission actually intends to pursue the allegations in the dismissed requests on its own, an improbable outcome given the limited resources available to

⁶ In the Matter of Fred B. Lott, Mimeo No. DA 93-1596, released January 11, 1994.

⁷ In the Matter of Lawrence E. Vaughn, Jr., 9 FCC Rcd 4438 (1994).

the agency. For this reason alone, it is questionable whether parties with dismissed requests would ever have an opportunity to secure that same spectrum unless they acquire the right to the channels as a geographic licensee pursuant to an auction and then re-initiate a compliance investigation. Even that "opportunity" may be beyond the realistic capability of parties who were seeking only the assignment of a specific frequency(s) at a particular geographic location, the essence of a Finder's Preference request, but who are financially incapable of securing a license in an auction. Finders pursuing PLMR channels would not even have that option as the FCC has not proposed to move from a site-specific to a geographic licensing scheme for those frequencies. While it is theoretically possible that the Commission might recover the targeted channels through its own compliance efforts, the frequencies would then become available to any and all qualified applicants. Since the finder would no longer have a preferred reassignment position, it is not clear on what basis the FCC has concluded that it would not be substantially harmed.

For these reasons, AMTA believes parties that submitted requests that have already been found by the FCC to conform to its procedural requirements are entitled to have their requests processed in accordance with currently applicable rules. In some cases, this may result in an FCC determination that the documentation provided does not support a prima facie violation, in which case the request should be dismissed without further action. Requests that meet the burden of proof should be decided on their merits. In all cases, the FCC should process these long-standing requests as expeditiously as possible. Prompt resolution of these matters will provide much needed certainty to existing and prospective geographic licensees in all of these bands, as well as to the individual parties to the proceedings.

IV. CONCLUSION

For the reasons described herein, AMTA recommends that the Commission adopt rules consistent with the comments detailed above.

CERTIFICATE OF SERVICE

I, Linda J. Evans, a secretary in the law office of Lukas, McGowan, Nace & Gutierrez, hereby certify that I have, on this 3rd day of December, 1996, caused to be mailed a copy of the foregoing Reply Comments to the following:

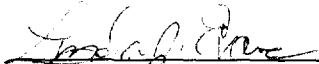
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